

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of	)	
the Pay Telephone Reclassification	)	CC Docket No. 96-128
and Compensation Provisions of	)	
the Telecommunications Act of 1996	)	
	)	NSD File No. L-99-34
RBOC/GTE/SNET Payphone Coalition	)	
Petition for Clarification	)	

**FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: May 23, 2003**

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**Comment date: 21 Days After Federal Register Publication of this Notice**

**Reply Comment date: 31 Days After Federal Register Publication of this Notice**

By the Commission:

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## I. INTRODUCTION

1. In this *Further Notice of Proposed Rulemaking (Further Notice)*, we seek comment on whether we need to amend our payphone compensation rules,<sup>1</sup> which are designed to provide fair per-call compensation pursuant to section 276 of the Act, to payphone service providers (PSPs).<sup>2</sup> Specifically, we seek comment on whether the rules should be amended to clarify which facilities-based carrier, the interexchange long distance carrier (IXC) or the switch-based long distance reseller, should be held responsible for tracking coinless payphone-originated calls to completion and for paying PSPs compensation for those calls. Under our current rules, IXCs and switch-based resellers, but not switchless resellers, have tracking and direct PSP compensation responsibilities.<sup>3</sup>

2. In response to arguments that our PSP compensation rules failed to provide fair compensation when a switch-based carrier is involved in the call path, the Commission, in the *Second Order on Reconsideration* in this proceeding, amended its rules to specify that the first IXC to receive a payphone call from a local exchange carrier (LEC) was responsible for tracking the call to completion and for compensating the PSP for the call.<sup>4</sup> However, on a petition for review, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the *Second Order on Reconsideration*.<sup>5</sup> The court held that the Commission violated the Administrative Procedure Act (APA) when it modified its rules four years after promulgation pursuant to a Common Carrier Bureau – issued notice that was not published in the Federal

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<sup>1</sup> See generally 47 C.F.R. Subpart M – Provision of Payphone Service (2002).

<sup>2</sup> 47 U.S.C. § 276. We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. See 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>3</sup> This *Further Notice* involves only per-call payphone compensation. Under certain circumstances specified in the Commission's prior orders in this proceeding, compensation must be paid on a per-payphone basis. The per-payphone compensation methodology was established in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, CC Docket No. 96-128, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd. 2020 (2002); and in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd. 21274 (2002).

<sup>4</sup> See generally 47 C.F.R. Subpart M – Provision of Payphone Service (2002); see also The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act Of 1996: RBOC/GTE/SNET Payphone Coalition Petition for Clarification, Second Order on Reconsideration, CC Docket No. 96-128, NSD File No. L-99-34, 16 FCC Rcd. 8098, App. B (Apr. 5, 2001), remanded sub nom., *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (*Sprint*). The Commission granted in part and denied in part petitions for reconsideration of the Second Order on Reconsideration. See The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act Of 1996: RBOC/GTE/SNET Payphone Coalition Petition for Clarification, Third Order on Reconsideration and Order on Clarification, CC Docket No. 96-128, NSD File No. L-99-34, 16 FCC Rcd. 20922 (2001) (Third Order on Reconsideration).

<sup>5</sup> *Sprint*, 315 F.3d at 377.

Register.<sup>6</sup> The D.C. Circuit held that the Commission should have issued a Notice of Proposed Rulemaking (NPRM).<sup>7</sup> The D.C. Circuit vacated the Commission's order,<sup>8</sup> but stayed its mandate and its vacatur of the *Second Order on Reconsideration* through September 30, 2003.<sup>9</sup> As a result, the rules promulgated in the *Second Order on Reconsideration* remain in effect through September 30, 2003.<sup>10</sup>

3. Pursuant to the D.C. Circuit's order, this *Further Notice* requests comment on whether we should amend our rules, as we did in the *Second Order on Reconsideration*, to clarify which facilities-based carrier, either the IXC or the switch-based reseller, is responsible for tracking coinless payphone calls and compensating PSPs for those calls. We invite comment on whether the rules adopted in the *Second Order on Reconsideration* or other new rules are necessary to satisfy section 276's requirement that we ensure fair per-call compensation to PSPs for completed coinless payphone calls.

## II. BACKGROUND

4. Section 276 of the Act requires the Commission to promulgate regulations ensuring that all PSPs are fairly compensated for every completed intrastate and interstate call, including coinless "access code" or "subscriber 800" calls<sup>11</sup> dialed from their payphones.<sup>12</sup>

<sup>6</sup> Sprint, 315 F.3d at 372, 375-377; see Common Carrier Bureau Seeks Comments on the RBOC/GTE/SNET Payphone Coalition Petition for Clarification Regarding Carrier Responsibility for Payphone Compensation Payment, Public Notice, CC Docket No. 96-128, NSD File No. L-99-34, DA 99-730 (rel. Apr. 15, 1999).

<sup>7</sup> Sprint, 315 F.3d at 377.

<sup>8</sup> Id.

<sup>9</sup> See *Sprint v. FCC*, No. 01-1266, slip op. (Apr. 1, 2003) (*Sprint II*).

<sup>10</sup> See *Second Order on Reconsideration*, 16 FCC Rcd. at 8111-8112, App. B (listing amendments to rules).

<sup>11</sup> An "access code call" means a call made using a sequence of numbers that, when dialed, connects the caller to the operator service provider (OSP) associated with that sequence, rather than the OSP presubscribed to the originating line. 47 U.S.C. § 226(a) (1). Access codes include toll-free numbers (such as those often dialed using calling cards), "10-10" numbers (101XXXX calls in equal access areas), and "950" Feature Group B numbers (950-0XXX or 950-1XXX anywhere, where the three-digit XXX denotes a particular interexchange carrier). See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, CC Docket No. 91-35, 7 FCC Rcd 3251, n.1 (1992). "Subscriber 800 calls" are not access code calls, but are calls placed directly to individual subscribers of toll-free numbers (such as 800, 888, 877, 866, etc.). See, e.g., *Toll Free Service Access Codes*, Fourth Report and Order and Memorandum Opinion and Order, CC Docket No. 95-155, 13 FCC Rcd 9058 (1998).

<sup>12</sup> Previously, PSPs were not assured of receiving revenues for coinless access code or subscriber 800 calls dialed from their payphones, even though PSPs are prohibited from blocking such calls under the Telephone Operator Consumer Services Improvement Act (TOCSIA), Pub. L. No. 101-435, 104 Stat. 986 (1990). Section 226 (c)(1)(B), enacted in TOCSIA, provides that a telephone "aggregator" (an entity such as a PSP or a hotel that makes public telephones available using an OSP) must "ensure that each of its telephones...allows the consumer to use '800' and '950' access code numbers to obtain access to the provider of operator services desired by the consumer." (continued....)

Since 1996, the Commission has issued a number of orders that have defined the relationship between PSPs and other carriers in the call path from the payphone to the called party for purposes of assuring that PSPs are adequately compensated for calls placed from payphones. In 1996, in the *First Payphone Order*,<sup>13</sup> the Commission adopted a “carrier-pays” system for per-call compensation, concluding that “the primary economic beneficiary of payphone calls should compensate the PSPs.”<sup>14</sup> The Commission concluded that the primary economic beneficiary was the IXC and required “all IXCs that carry calls from payphones [. . .] to pay per-call compensation.”<sup>15</sup> The Commission recognized that switchless long distance resellers do not have the facilities to track calls.<sup>16</sup> In the interests of lower costs and administrative efficiency, the Commission required facilities-based carriers to pay for calls received by their long distance reseller switchless customers and then, if they so chose, “to impose the payphone compensation amounts on these [reseller] customers.”<sup>17</sup>

5. The *First Payphone Order* also established rules for tracking payphone calls. Specifically, the order stated that the “underlying, facilities-based carrier has the burden of tracking calls to its reseller customers,” that the facilities-based carrier “may recover that cost from the reseller, if it chooses,” and that the tracking obligation “parallel[s] the obligation of the facilities-based carrier to pay compensation.”<sup>18</sup> The Commission also required that the Automatic Number Identification (ANI) for each payphone, including each LEC payphone, include the appropriate coding digits to enable the facilities-based carrier to track payphone-originated calls.<sup>19</sup>

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47 U.S.C. § 226 (c)(1)(B). This provision is implemented by the Commission's regulations at 47 C.F.R. § 64.704(a), “Call blocking prohibited.” The proscription has the effect of also precluding PSPs from blocking calls to subscriber 800 numbers, because when toll-free numbers are dialed, no distinction exists between subscriber 800 calls and toll-free number access code calls. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, CC Docket No. 91-35, 7 FCC Rcd 3251 (1992).

<sup>13</sup> The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-128, 11 FCC Rcd 20541 (1996) (First Payphone Order).

<sup>14</sup> *Id.* at 20584.

<sup>15</sup> *Id.* In the *First Payphone Order*, for purposes of the payphone compensation rules, the Commission defined IXCs to include LECs (both incumbent and non-incumbent) to the extent that LECs carry compensable payphone calls. *Id.* at 20584 n. 293.

<sup>16</sup> *Id.* at 20586.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 20591-92.

<sup>19</sup> *Id.* at 20582.

6. In the *Order on Reconsideration*, the Commission addressed the payphone compensation responsibilities for calls involving resellers that maintain their own switches.<sup>20</sup> Recognizing that switch-based resellers were the primary economic beneficiary of payphone calls and were capable of tracking calls, the Commission imposed on switch-based resellers the responsibility to pay compensation to the PSPs.<sup>21</sup> The Commission also reaffirmed the compensation responsibilities of switchless long distance resellers. The Commission stated that, “[i]f a [reselling] carrier does not maintain its own switching capability, then, as set forth in the [*First Payphone Order*], the first underlying carrier remains obligated to pay compensation to the PSP in lieu of its [reseller] customer that does not maintain a switching capability.”<sup>22</sup>

7. In order to help PSPs identify the carrier from which compensation was due for coinless calls, the Common Carrier Bureau in 1998 clarified the *Order on Reconsideration*, setting forth reporting requirements for the IXC and the switch-based reseller.<sup>23</sup> The Bureau stated that, where a switch-based reseller identified itself as responsible for compensating the PSP, the IXC must notify the billing PSP that the switch-based reseller, not the IXC, was responsible for paying per-call compensation for a particular 800 number. Finally, the Bureau specifically cautioned that neither IXCs nor switch-based resellers may “avoid compensating PSPs by withholding the name of the carrier responsible for paying per-call compensation, thereby avoiding the requirements of the *Payphone Orders* and section 276.”<sup>24</sup>

8. Subsequently, in the *Bell Atlantic-Frontier Order*, the Commission concluded that the *Order on Reconsideration* and the Common Carrier Bureau’s *Coding Digit Waiver Order* placed the tracking and compensation obligations squarely on the facilities-based carriers involved in routing the coinless call, including facilities-based resellers.<sup>25</sup> The Commission also stated that “the logical construction of the language from the *Coding Digit Waiver Order*

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<sup>20</sup> The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order on Reconsideration*, CC Docket No. 96-128, 11 FCC Rcd 21233 (1996) (*Order on Reconsideration*).

<sup>21</sup> *Id.* at 21277.

<sup>22</sup> *Id.*

<sup>23</sup> The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order, CC Docket No. 96-128, 13 FCC Rcd 10893 (1998) (*Coding Digit Waiver Order*).

<sup>24</sup> *Id.* at 10915-16.

<sup>25</sup> *In re Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.; Bell Atlantic-Delaware, Inc. v. MCI Telecommunications Corp.*, File No. E-98-48, File No. E-98-49, Memorandum Opinion and Order, 16 FCC Rcd 8112 (2001) (*Bell Atlantic-Frontier Order*).

requires a first facilities-based carrier to pay [the PSP] unless the reseller has identified itself to the first facilities-based carrier as being responsible for paying compensation.”<sup>26</sup>

9. In response to a Petition for Clarification of the Rules,<sup>27</sup> the Commission found, in the *Second Order on Reconsideration*, that PSPs were still not receiving full compensation for payphone-originated calls when a switch-based reseller was in the call path.<sup>28</sup> The Commission further found that, despite its efforts to clarify the compensation responsibilities of facilities-based carriers, there remained confusion in the marketplace as to which carriers were responsible for compensating the PSPs.<sup>29</sup> The Commission agreed with commenters that stated that PSPs suffer shortfalls in compensation when calls are routed from an IXC to a switch-based reseller.<sup>30</sup> The Commission agreed with the American Public Communications Council (APCC) that IXCs might unilaterally determine that they were not responsible for paying compensation for calls routed to switch-based resellers, but the IXCs would not identify which resellers were responsible for compensation, even when the PSPs requested that information.<sup>31</sup> APCC further claimed that when an IXC and a switch-based reseller determined, independently, that neither was responsible for compensation on a call, neither would track the call.<sup>32</sup> Some IXCs and resellers, however, denied there was a shortfall in compensation, claiming that the PSPs had

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<sup>26</sup> *Id.* at 8120, para. 15.

<sup>27</sup> *See Petition for Clarification*, CC Docket No. 96-128, NSD File No. L-99-34, filed by RBOC/GTE/SNET Payphone Coalition (collectively the Coalition) (Feb. 26, 1999) (Coalition Petition). Parties filing comments and reply comments regarding the Coalition Petition are listed in the attached Appendix.

<sup>28</sup> *Second Order on Reconsideration*, 16 FCC Rcd. at 8103, para. 8.

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* At the time that its petition was filed in February 1999, the Coalition claimed that from 20 to 50 percent of revenues from major IXCs and up to 100 percent of revenues from smaller IXCs for calls routed through a switched-based reseller went uncollected. Coalition Petition at 2. For individual BOCs the Coalition claimed that Bell Atlantic had invoiced 1,200 carriers for the fourth quarter of 1998, but that fewer than 50 paid anything and Bell Atlantic’s shortfall for all of 1998 ran at 30 percent of expected revenues. The Coalition also stated BellSouth sent invoices to between 110 and 120 carriers, but only 68 IXCs paid anything at all and BellSouth’s shortfall exceeded 22 percent of expected revenues. The Coalition further stated that Ameritech contracted over 600 carriers but only 59 paid compensation. SBC received payment from only 40 IXCs. Coalition Reply Comments at 5-6. APCC stated that, at the end of 1998, it invoiced some 1,200 companies identified as carriers and requested each to disclose the number of calls received from APCC’s PSP clients and pay compensation for such calls. APCC stated that less than one-third responded, most claiming they were not required to pay compensation, and only 73 of the 1,200 companies paid compensation. APCC Comments at 4-5. Unless otherwise noted, referenced comments refer to comments filed in response to the Coalition Petition. A list of commenters is set forth in the attached Appendix.

<sup>31</sup> APCC Comments at 3, 4.

<sup>32</sup> APCC Comments at 7; APCC Reply Comments at 5.

presented only unsupported statements but no evidence of shortfalls, and that if a shortfall existed, it was due to PSP billing failures.<sup>33</sup>

10. In the *Second Order on Reconsideration*, the Commission made the following findings. First, the Commission found that PSPs were not being fully compensated for completed coinless calls.<sup>34</sup> Second, the Commission concluded that, under the compensation rules then in place, it was difficult for a PSP to determine which facilities-based carrier was responsible for compensating the PSP for such calls (*i.e.*, the switch-based reseller or the IXC that routes calls to the switch-based reseller). Third, the Commission found that the first underlying facilities-based IXC to which the LEC directly delivers such calls was best situated to provide call routing information to the PSPs and to reimburse the PSPs for completed coinless calls.<sup>35</sup>

11. Based on these findings, in the *Second Order on Reconsideration*, the Commission adopted rules requiring the first facilities-based IXC to which a LEC routes a compensable coinless payphone call to: (1) compensate the PSP for completed calls at a mutually agreeable rate; (2) track or arrange for tracking of the call to determine whether it is completed and therefore compensable; and (3) provide to the PSP a statement of the number of coinless calls it receives from each of that PSP's payphones. The Commission required each reseller or debit card customer whose number is dialed on a coinless basis to reimburse the first facilities-based carrier (1) for the amount paid by that carrier to the PSP and (2) for that carrier's cost of tracking the call and providing such information to the PSP. The Commission also encouraged PSPs and switch-based resellers to enter into private contractual arrangements with each other for direct payment of compensation to PSPs.<sup>36</sup>

12. As noted above, the D.C. Circuit vacated the *Second Order on Reconsideration* on the grounds that parties were not afforded proper notice and opportunity for comment.<sup>37</sup> The D.C. Circuit held that the Commission should have issued a new NPRM to notify properly the public that the Commission might adopt new payphone compensation rules.<sup>38</sup>

### III. DISCUSSION

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<sup>33</sup> Cable & Wireless Comments at 2-3; MCI WorldCom Comments at 3-4; TRA Comments at 6.

<sup>34</sup> *Second Order on Reconsideration*, 16 FCC Rcd at 8103, para. 8.

<sup>35</sup> *Id.* at 8106-07, paras. 15-16.

<sup>36</sup> See *Second Order on Reconsideration*, 16 FCC Rcd. at 8108, para.21, App. B (setting forth amended rules); see also 47 C.F.R. §§ 64.1300, 64.1310(a), (b) (2002).

<sup>37</sup> *Sprint*, 315 F.3d at 372, 378.

<sup>38</sup> *Id.* at 372, 378.

13. In the *Second Order on Reconsideration*, we found that, in spite of the Commission's efforts in the *First Payphone Order*, the *Order on Reconsideration*, and subsequent orders to ensure that PSPs are compensated for "each and every completed interstate and intrastate call," "PSPs suffer shortfalls in compensation when calls are routed from an IXC to a switch-based reseller."<sup>39</sup> Although several parties sought reconsideration of various aspects of the *Second Order on Reconsideration*, no party challenged this conclusion.<sup>40</sup> Similarly, although on review in the D.C. Circuit some IXCs challenged the remedy the Commission had adopted, no party challenged our conclusion that our previous orders in the various payphone proceedings had "not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call."<sup>41</sup> Moreover, no party challenged our conclusion that a major source of the shortfall resulted from the lack of information available to PSPs and the fact that the PSP compensation framework as it existed prior to the *Second Order on Reconsideration* left PSPs in the position of being dependent on switch-based resellers to identify themselves voluntarily as responsible for paying dial around compensation (which the Commission concluded that resellers have little incentive to do).<sup>42</sup>

14. Accordingly, while we intend to conduct a full and open proceeding on the appropriate remedy to address the shortfalls that existed in the PSP compensation system prior to the adoption of the *Second Order on Reconsideration*, we believe that the unchallenged record already established in this proceeding documents the need for reform of the system as it existed prior to the adoption of the *Second Order on Reconsideration*. We therefore tentatively conclude that, prior to the adoption of our current rules, PSPs were not receiving fair per-call compensation and we do not believe it feasible or appropriate to return to that system.

15. We of course invite parties to submit any comments and data relevant to this tentative conclusion and to submit updated data on how the PSP compensation scheme is functioning under the regime established by the *Second Order on Reconsideration*. But we emphasize that we are committed to the statutory command of ensuring "that all payphone providers are fairly compensated for each and every completed interstate and intrastate call."<sup>43</sup>

16. To assist us in our analysis of the PSP marketplace and how to amend the payphone compensation rules, we invite comments on four questions: (1) are PSPs receiving fair compensation when a switch-based reseller is involved in the routing of a payphone originated

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<sup>39</sup> Second Order on Reconsideration at para. 8.

<sup>40</sup> See Third Order on Reconsideration.

<sup>41</sup> *Second Order on Reconsideration* at para. 10. See Brief filed for Sprint Corp. et al., No. 01-1266 (D.C. Circuit Mar. 11, 2002) ("The record shows that. . . PSPs have had trouble collecting from SBRs [switch-based resellers].").

<sup>42</sup> Second Order on Reconsideration at para. 15.

<sup>43</sup> 47 U.S.C. § 276.



call; (2) which facilities-based carrier in the call path is best able to track a completed call made from a payphone; (3) which facilities-based carrier is best situated both to compensate the PSP and seek reimbursement from other carriers that derive an economic benefit from the call; and (4) what types of contractual relationships for tracking and payment of payphone calls should the Commission permit as exceptions to its payphone compensation rules.

17. In their responses to the above four questions, parties are invited to comment on how the rules issued in the *Second Order on Reconsideration* have affected PSP compensation and mechanisms for ensuring fair per-call compensation. How have the *Second Order on Reconsideration*'s rules been implemented by the industry? How have the rules affected call tracking technologies? What arrangements have been made for compensating PSPs and for seeking reimbursement from switch-based resellers? Have these rules achieved their intended result of achieving fair compensation? Or are there alternative rules the Commission should consider to ensure fair compensation?

#### **A. Fair Compensation**

18. Section 276 of the Act requires that PSPs be compensated fairly for "each and every completed intrastate and interstate call" (*i.e.* answered by the called party).<sup>44</sup> The Coalition and others have argued that the *Payphone Order on Reconsideration* and the Bureau's *Coding Digit Waiver Order* did not have the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call. As noted above, the comments filed in response to the Coalition's Petition argued that PSPs were unable to identify which IXC or switch-based reseller had completed a payphone-originated call and was therefore responsible for compensation. Accordingly, the commenters argued that PSPs were unable to obtain full compensation. As a preliminary question, then, comment is invited on the Coalition's arguments. Comment is also invited on whether, prior to the rules adopted in the *Second Order on Reconsideration*, PSPs received full per-call compensation for calls that involved switch-based resellers.

19. If PSPs did not receive fair compensation prior to the *Second Order on Reconsideration*, did that order address, in full or in part, the alleged compensation problems? Thus, we also seek comment on the current state of PSP compensation. How have our rules worked or failed in their purpose? Are PSPs currently receiving fair compensation from switch-based resellers? We are aware that there are a large number of resellers in the marketplace and that they can enter and exit the market relatively easily. It is possible that the ease of market exit might make difficult for PSPs to (1) locate resellers and (2) obtain compensation. APCC argues

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<sup>44</sup> 47 U.S.C. § 276(b)(1)(A). See *First Payphone Order*, 11 FCC Rcd at 20573-20574 ("We conclude that a 'completed call' is a call that is answered by the called party."); *Order on Reconsideration*, 11 FCC Rcd at 21242 (citing *First Payphone Order*); *Coding Digit Waiver Order*, 13 FCC Rcd at 10915 ("The Commission defined a completed call as a call answered by the called party. Because a blocked call is by definition not a completed call, the *Payphone Orders* do not require such compensation.").

that, “[g]iven the huge number of resale carriers in the United States, the vast majority of resellers appear to have reasoned that they can avoid paying compensation simply by ‘keeping their heads down.’”<sup>45</sup> We invite comment on this conclusion and on any other difficulties PSPs may face in obtaining compensation from the IXC and resellers. We also invite comment on whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated.

20. Are there any alternatives to the rules adopted in the *Second Order on Reconsideration* that would ensure fair PSP compensation? Should the Commission revisit compensation proposals that it, in prior orders, found to be inconsistent with section 276? These proposals included, *inter alia*, a “set-use fee” system,<sup>46</sup> a “proxy call completion methodology,”<sup>47</sup> and an IXC “hand-off” proposal.<sup>48</sup>

## **B. Call Tracking and Reporting**

21. According to the Coalition, PSPs suffer compensation shortfalls because IXCs and switch-based resellers do not accurately track whether payphone originated calls have been completed. In addition, the Coalition argues that the IXCs do not provide PSPs with sufficient information regarding calls routed to switch-based carriers such that the PSPs can identify and seek compensation from switch-based carriers. In this section, we seek comment on how calls are routed and tracked, which facilities-based carrier most reasonably should be required to track

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<sup>45</sup> APCC Comments at 4. APCC argues that:

PSPs are left with several burdensome tasks: (1) identifying those switch-based resellers that are receiving a significant volume of calls from payphones and who are therefore worthwhile candidates for lawsuits to enforce payment; (2) identifying which of those resellers are “switch-based” resellers; (3) finding those resellers; and (4) extracting payment from each of these resellers.”

APCC Comments at 4. For a further discussion of PSP difficulty in recovering compensation from switch-based resellers, see note 30 *supra*.

<sup>46</sup> Under this proposal, the facilities-based carrier would pay the PSP a set-use fee every time a caller initiated a payphone call. *First Payphone Order*, 11 FCC Rcd. at 20585-86, para. 84.

<sup>47</sup> For example, commenters have argued that the Commission should adopt proxy methods for determining the number of completed, compensable calls. See *Third Order on Reconsideration*, 16 FCC Rcd at 20925-26, paras. 7-8; compare *First Payphone Order*, 11 FCC Rcd. at 20589, para. 92 (arguing that it was unable to determine which calls originated from payphones in 1996, AT&T submitted a proposal that PSP compensation be based on a surrogate methodology for estimating the volume of calls that originated at payphones and that compensation be based on this methodology). This *Further Notice* is not seeking comment on whether IXCs can determine whether a call originated at a payphone. Rather, this *Further Notice* seeks comment on how to determine which payphone-originated calls are completed.

<sup>48</sup> IXCs have argued that a call should be deemed “completed” every time it is switched from the IXC to the switch-based reseller’s platform, even if it is unknown whether the called party answers the call. See *Third Order on Reconsideration*, 16 FCC Rcd. at 20925-26, paras. 7-8.

and report each completed coinless payphone call, and how each carrier should compensate other carriers for tracking and reporting services.

22. *Call Routing to the IXC.* The actual methods employed to route a coinless call made from a payphone to a called party may vary significantly from call to call, depending on which PSP, LEC, IXC, and long distance reseller are involved in routing the call. This is because each of these entities may use differently configured facilities and hardware for call routing. Regardless of how a carrier's facilities are configured, the ability of a carrier to track routed calls is an essential element in a determination of which carrier may be better situated to track a telephone call to completion. Accordingly, it is helpful to review some basics, as we understand them, regarding such routing. Initially, every payphone call, including coin-sent paid and coinless, is received by the LEC switch serving the payphone. If necessary, the call is then routed to the underlying facilities-based interexchange carrier. For a coin-sent paid call,<sup>49</sup> the LEC routes the call to the carrier selected by the PSP and presubscribed to the payphone. For a coinless call, however, the carrier to which the call is routed is selected either (1) by the calling party if the calling party dials an access code or (2) by the called party if the calling party dials a subscriber 800 number.<sup>50</sup> The first underlying facilities-based IXC or the first reseller of the facilities-based IXC's services (*i.e.*, the IXC's reseller customer) will then switch and transmit the call for completion.

23. At every stage of the call flow there is billing information generated and passed between the entities, particularly the appropriate originating payphone ANI digits that the LEC transmits to the underlying facilities-based IXC, so that each party along the call path knows to whom it has rendered a service.<sup>51</sup> The notable exception in this information flow is the PSP. Call completion and billing information is not automatically passed to the PSP, because the PSP's payphone is on the "line" side of the LEC switch and cannot receive call routing information generated on the trunk side by the LEC. It is also important to note that the LEC does not track the routing of the call once the LEC delivers the call to the underlying facilities-based IXC.

24. A calling or called party to a call may select any of several possible carriers for an access code or subscriber 800 call, including an IXC, a switchless reseller, or a switch-based reseller. If the calling or called party selects an IXC, the call is routed from the LEC to the IXC to the called party. If the calling or called party selects a switchless reseller of an IXC, the call is

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<sup>49</sup> A coin sent-paid call is a call made by depositing coins in a coin-operated public payphone. *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Fifth Report and Order, 17 FCC Rcd 21233, 21234 (2002).

<sup>50</sup> Other coinless payphone calls such as "0" (operator) and "411" (directory assistance) are not at issue in this *Further Notice*. See *First Payphone Order*, 11 FCC Rcd at 20551 and 20569.

<sup>51</sup> Letter from Robert F. Aldrich, Counsel, APCC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-128, at 15 (filed Nov. 16, 2000) (APCC *Ex Parte*).

likewise routed from the LEC to the underlying IXC to the called party, but for the reseller's account. If the party selects a switch-based reseller, the IXC routes the call to the reseller's switch where the call validation and processing functions occur. We invite comment on whether, in the time since the adoption of the *Second Order on Reconsideration*, any of these routing methods have changed.

25. *Call Tracking from the IXC to the Switch-Based Reseller to the Called Party.* In the *Second Order on Reconsideration*, the Commission required the first IXC to which the LEC directly delivers the coinless call to track or arrange for tracking all compensable calls made to switch-based resellers.<sup>52</sup> The Commission found that only the first IXC in the call path was reasonably certain to have access to all the information necessary for per-call tracking.<sup>53</sup> In addition to having access to all call-origination information, because of their customer relationship with switch-based resellers, the IXCs could contract with the switch-based resellers to obtain call completion information from the switch-based resellers.<sup>54</sup>

26. We seek comment on this conclusion and on whether the first IXC in the call path has been able to track, or make arrangements to track, completed coinless calls. How have IXCs been tracking compensable PSP calls delivered to their reseller customers since the *Second Order on Reconsideration* was issued? In the *Second Order on Reconsideration*, we noted that IXCs, PSPs and switch-based resellers could establish clearinghouse arrangements to track coinless calls. We also seek comment on whether parties have entered into such arrangements, and whether such arrangements have resulted in satisfactory compensation mechanisms for PSPs.

27. We also invite comment on whether the Commission should adopt different tracking rules than those adopted in the *Second Order on Reconsideration*. In this regard, commenters have disputed whether the IXC or the switch-based reseller is best situated to determine whether a payphone originated call has been answered by the called party. Switch-based resellers contend that they are unable to determine where a call originated. These resellers state that they are unable to receive ANI information, which identifies whether a call originated from a payphone.<sup>55</sup> The IXCs maintain that switch-based resellers may obtain this information from the SS7 signaling network.<sup>56</sup> We seek comment on these arguments.

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<sup>52</sup> *Order on Reconsideration*, 16 FCC Rcd at 8106-07, para. 16.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See Order on Reconsideration*, 16 FCC Rcd at 8106-07, para. 16.

<sup>56</sup> Qwest Comments at 3-4; *see* APCC Comments at 7 n.6.

28. On the other hand, IXC's state that they do not have the technology to determine whether a call is answered by the called party or whether the calling party is making multiple calls with a calling card without hanging up between calls. The IXC's state that once they transfer a call to a switch-based reseller and receive answer supervision from the switch-based reseller for that call, the IXC's do not receive answer supervision for calls (such as calling card calls or pre-paid phone card calls) that are re-originated on the switch-based reseller's platform.<sup>57</sup> Thus, the IXC's state that are unable to track on a per-call basis whether a call has been answered by the called party.<sup>58</sup> Resellers and other parties state that technology exists for the IXC's to use the SS7 to determine whether a call has been completed by the switch-based reseller.<sup>59</sup>

29. We invite comment on the above arguments, particularly on which facilities-based carrier most reasonably would have facilities in place, or could build such facilities (including the installation of software), to track calls to completion. We also seek comment concerning which carrier has access to the most information for call tracking and whether there are any technological differences between an IXC's and a switch-based reseller's ability to track calls. Is one better able to track calls than the other? Is it technically and administratively feasible to split tracking responsibilities between IXC's and resellers? What effect does the IXC's contractual relationship with a reseller have on our analysis? Can IXC's work with switch-based resellers to review and reconcile call data records to track calls?

30. Have IXC's been able to use their customer relationships with switch-based resellers to obtain contractual cooperation from the switch-based resellers in tracking calls to completion, as the current compensation rules envisioned? If we retain rules requiring IXC's to track calls, should we also promulgate rules imposing obligations on switch-based resellers to cooperate in call tracking and compensation? We also invite comment on any difficulties in tracking calls in cases where there are multiple switch-based resellers or IXC's in the call path. In such instances, what obligations, if any, should the Commission impose on the additional switch-based resellers or IXC's in tracking a payphone-originated call to completion?

31. In the *Second Order on Reconsideration*, the Commission found that nothing in the record suggested that the Commission should depart from its original decision not to require

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<sup>57</sup> Comments filed by WorldCom, Inc., CC Docket No. 96-128, at 3-4 (Oct. 9, 2001) (WorldCom Oct. 9 Comments). Signaling system 7 (SS7) is a data network that provides communications links between switching equipment and telephone company databases that are used to establish and close transmission paths over which telephone calls are carried. *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19659 n. 293 (2001).

<sup>58</sup> Id.

<sup>59</sup> Opposition filed by CommuniGroup of K.C., Inc. et al., CC Docket No. 96-128, at 7-9 (Oct. 9, 2001); Comments filed by Intellicall Operator Services, Inc., CC Docket No. 96-128, at 3-4 (Oct. 9, 2001) (argues that switch-based resellers can assist IXC's in call tracking switched calls by providing them accurate data in a specified format).

a standardized technology or methodology for tracking calls.<sup>60</sup> The Commission found that not only may the first underlying facilities-based IXC to whom the LEC directly delivers the call use the technology of its choice to meet its tracking obligations, this carrier also has the option of performing the tracking itself or contracting out these functions to another party, such as a LEC or clearinghouse.<sup>61</sup> We invite comment on this conclusion. Does this conclusion avoid placing a technological burden on the facilities-based carrier that is required to track coinless calls?

32. In light of section 276's requirement that PSPs be fairly compensated, does it make any difference which facilities-based carrier tracks payphone-originated calls? Are there any other statutes or Commission rules that may be relevant to our analysis? What other technical, administrative, or financial factors or burdens should the Commission consider in making this determination?<sup>62</sup>

33. *Reporting Requirements.* The Coalition argued, prior to the *Second Order on Reconsideration*, that PSPs were unable to obtain from IXCs sufficiently detailed call tracking information to enable the PSPs to collect compensation from the switch-based resellers. As a result, in the *Second Order on Reconsideration*, the Commission required the first IXC in the call path to send call reports to PSPs. The Commission adopted a rule requiring the first IXC to send "to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered [. . .], and the volume of calls for each toll-free and access number each carrier has received from each of the payphone service provider's payphones...."<sup>63</sup>

34. We invite comment on how effectively these reporting requirements have addressed PSP concerns. Should alternative reporting requirements be adopted? We invite comment on the level of detail the reports should contain such that PSPs may reasonably ascertain that they have been fully compensated. If commenters argue that the Commission should abandon the reporting requirements, those commenters should propose alternative methods that would enable a PSP to verify that it has been fully compensated.

35. We also invite comment on whether the facilities-based carrier that tracks coinless calls should also be responsible for providing tracking reports to the PSP. Are there any administrative, technical, or financial burdens involved in generating such reports? Is the

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<sup>60</sup> *First Payphone Order*, 11 FCC Rcd at 20590-91; *Second Order on Reconsideration*, 16 FCC Rcd at 8107, para. 17.

<sup>61</sup> *Id.* at 20590-91

<sup>62</sup> *See Sprint*, 315 F.3d at 378 (IXCs may have been able to affect the Commission's determinations by "presenting additional information demonstrating shortcomings and burdens that the Commission had not adequately considered").

<sup>63</sup> *Second Order on Reconsideration*, 16 FCC Rcd at 8111, App. B; *see* 47 C.F.R. § 64.1310(a) (2002).

information requested by such reports the type of information that the IXC's or the switch-based resellers would maintain regardless of a Commission rule?

36. *Compensation for Tracking and Reporting.* In the *Second Order on Reconsideration*, the Commission permitted IXC's to recover from their switch-based reseller customers the expense of tracking and reporting compensable calls by negotiating reimbursement terms in future contract provisions.<sup>64</sup> The Commission stated that it believed that this requirement is consistent with the Commission's conclusion in the *First Payphone Order* that the primary economic beneficiary of payphone calls should bear the cost of the call.<sup>65</sup>

37. We invite comment on whether the IXC's have taken advantage of their ability to recover their tracking and reporting costs as permitted by the *Second Order on Reconsideration*. Have IXC's installed new software or built new facilities to track and report calls in response to the *Second Order on Reconsideration*? Also, have the IXC's sought and successfully received compensation from switch-based resellers? Have the costs of any new facilities or software been passed on to the calling party or the called party? What types of compensation arrangements currently exist between IXC's and switch-based resellers?

38. Should we continue this practice of permitting one facilities-based carrier to recover its costs from the other facilities-based carrier? Does it make any difference which facilities-based carrier (IXC or switch-based reseller) is responsible for tracking and reporting calls in a determination whether one carrier should compensate the other? Even if the Commission determines that one facilities-based carrier is better situated to track and report calls, which facilities-based carrier ultimately benefits from such tracking and reporting and should pay for its costs? If we permit a facilities-based carrier to recover the costs of tracking and reporting, would that mitigate any financial, technical, or financial burden that the facilities-based carrier might arguably incur?

### C. Compensating PSPs for Completed Coinless Calls

39. In the *First Payphone Order*, the Commission found that, "in the interest of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers."<sup>66</sup> In the *Second Order on Reconsideration*, the Commission found that in many instances, facilities-based carriers and switch-based resellers determine independently that they are not responsible for compensating PSPs under Commission rules, with the result that no compensation is made to PSPs for some compensable calls.<sup>67</sup> Because PSPs were unable to track coinless calls made to switch-based

<sup>64</sup> *Second Order on Reconsideration*, 16 FCC Rcd at 8107, para. 18, App. B; see 47 C.F.R. § 64.1310(b) (2002).

<sup>65</sup> *First Payphone Order*, 11 FCC Rcd at 20586.

<sup>66</sup> *Id.* at 20586, para. 86.

<sup>67</sup> *Second Order on Reconsideration*, 16 FCC Rcd at 8105, para. 14.

resellers, and because of the IXC's financial relationships with the switch-based resellers, the Commission imposed on IXCs the responsibility for compensating PSPs for each completed call.<sup>68</sup> IXCs were then permitted to recover PSP compensation from the switch-based reseller that completed the call.<sup>69</sup>

40. We invite comment on how the *Second Order on Reconsideration's* compensation mechanisms have operated in the market. Are PSPs now being fully compensated? Are IXCs being fully reimbursed? Are there alternative compensation mechanisms that might operate more efficiently and serve section 276's requirement that we ensure fair PSP compensation?

41. We invite comment on whether the Commission should, as it did in the *Second Order on Reconsideration*, amend its rules to clarify which facilities-based carrier is responsible for compensation. If no rules were adopted, could switch-based resellers avoid compensation liability in the manner in which the Coalition alleges? And how could they avoid compensation? Of the two facilities-based carriers that derive primary economic benefit from a coinless call, which one should be required to arrange for fair compensation to the PSP when a coinless call is completed across the facilities of an IXC and a switch-based reseller? Should the carrier responsible for tracking and reporting also be held responsible for paying compensation to the PSP? Are there reasons why it might be reasonable to require one facilities-based carrier to provide tracking and reporting and to require the other facilities-based carrier to be responsible for compensating the PSP? Which carrier would be most capable, financially, technically, and administratively, of compensating the PSP and recovering compensation from the other carrier? Are there any other relevant factors in the relationships among IXCs, resellers, LECs, and PSPs that would enable one type of carrier to more effectively compensate the PSP?

42. Should the Commission adopt a direct-billing arrangement between underlying facilities-based carriers and PSPs? Should the facilities-based carrier be required to send each PSP a statement indicating the toll-free and access code numbers for calls that the LEC has routed to the carrier, and the volume of calls for each toll-free and access code number that each carrier has received from each of that PSP's payphones?

#### **D. Private Contracts to Provide Compensation to PSPs**

43. If the Commission were to adopt revisions to its compensation rules as a result of this *Further Notice*, should PSPs be permitted to continue and to rely upon any current or future contractual arrangements that they may have with underlying facilities-based carriers or resellers? In the past, the Commission has repeatedly encouraged facilities-based carriers and resellers (both switched-based and switchless) to establish private contractual arrangements with PSPs for direct billing and payment to PSPs, assuming that the PSP agrees to the contract

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<sup>68</sup> *Id.* at 8105-06, para. 15; *see id.* App. B; *see also* 47 C.F.R. § 64.1300(a) (2000).

<sup>69</sup> *Id.* at 8107, para. 18.



conditions.<sup>70</sup> We note that we adopted such a rule in the *Second Order on Reconsideration* and we now seek comment on how this rule has worked in practice.<sup>71</sup> Comment is also invited on whether other approaches might be appropriate.

#### IV. PROCEDURAL MATTERS

##### A. Ex Parte Presentations

44. These matters shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>72</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.<sup>73</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

##### B. Comment Filing Procedures

45. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,<sup>74</sup> interested parties may file comments within 21 days after publication of this *Further Notice* in the Federal Register and may file reply comments within 31 days after publication of this *Further Notice* in the Federal Register. All filings should refer to CC Docket No. 96-128. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>75</sup>

46. Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number, which in this instance is CC Docket No. 96-128. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfshelp@fcc.gov](mailto:ecfshelp@fcc.gov), and should include the following words in the regarding line of the message: “get form<your e-mail address>.” A sample form and directions will be sent in reply.

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<sup>70</sup> See *First Payphone Order*, 16 FCC Rcd at 8098, 8107.

<sup>71</sup> See *Second Order on Reconsideration*, 16 FCC Rcd at 8107-08, para. 19; see 47 C.F.R. § 64.1320(b) (2002).

<sup>72</sup> 47 C.F.R. §§ 1.200 *et seq.*

<sup>73</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>74</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>75</sup> See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

47. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

- For hand deliveries, the Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.
- All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

48. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.<sup>76</sup> We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in this *Further Notice* in order to facilitate our internal review process.

### **C. Initial Paperwork Reduction Act Analysis**

49. This *Further Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice*, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due 60 days from date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and

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<sup>76</sup> See 47 C.F.R. § 1.48.

clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

50. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judith Boley Herman, Federal Communications Commission, Room 1-C804, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov), and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17<sup>th</sup> Street, NW, Washington, DC 20503, or via the Internet to [Kim\\_A.\\_Johnson@omb.eop.gov](mailto:Kim_A._Johnson@omb.eop.gov).

#### **D. Initial Regulatory Flexibility Analysis**

51. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>77</sup> the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Further Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided above. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>78</sup> In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>79</sup>

##### **1. Need for, and Objectives of, the Proposed Rules**

52. On a petition for review, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), on January 21, 2003, remanded the *Second Order on Reconsideration* in this proceeding. The *Second Order on Reconsideration* had amended the Commission's payphone compensation rules. The D.C. Circuit did not address the merits of these rules, but instead found that the Commission had violated the Administrative Procedure Act (APA) in adopting them.

53. In the *Second Order on Reconsideration* in this proceeding, the Commission found that payphone service providers (PSPs) were not receiving fair compensation when a switch-based long distance reseller completed a payphone-originated call. The Commission found that, prior to the adoption of the order, there was confusion in the marketplace as to which facilities-based carrier – the interexchange carrier (IXC) or the switch-based reseller – was

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<sup>77</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

<sup>78</sup> See 5 U.S.C. § 603(a).

<sup>79</sup> See *id.*

responsible for tracking payphone-originated calls to completion and compensating the PSP (switchless resellers are not required to track calls or compensate the PSP). The Commission also found that, because of the way telephone calls are switched, PSPs do not have the ability to track calls to completion. Thus, the Commission, in the *Second Order on Reconsideration* in this proceeding, amended its rules to specify that the first IXC to receive a payphone call from a local exchange carrier (LEC) was responsible for tracking the call to completion and for compensating the PSP for the call. The first IXC was also required to prepare reports of completed payphone calls so that the PSPs could verify that they were being adequately compensated. The Commission permitted the IXC to then seek reimbursement from its switch-based reseller customer for both the payment to the PSP and its expenses in tracking and preparing tracking reports.

54. The overall objective of this *Further Notice* is to ensure that PSPs receive fair per-call compensation pursuant to section 276 of the Act. In this regard, the *Further Notice* asks whether the Commission should retain the PSP compensation rules adopted in the *Second Order on Reconsideration* or whether any alternative rules should be adopted to address PSP problems in receiving fair compensation.

## **2. Legal Basis**

55. The legal basis for any action that may be taken pursuant to the *Further Notice* is contained in sections 1, 4(i), 4(j), and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 276, and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216, of the Commission's rules, 47 C.F.R. §§ 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216.

## **3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply**

56. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.<sup>80</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>81</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>82</sup> A small business concern is one which: (1) is independently owned and

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<sup>80</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>81</sup> *Id.* § 601(6).

<sup>82</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>83</sup>

57. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a specific definition of small providers of incumbent local exchange services. The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>84</sup> According to the most recent *Telephone Trends Report* data, 1,335 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.<sup>85</sup> Of these 1,335 carriers, 1,037 reported that they have 1,500 or fewer employees and 298 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>86</sup> We do not have data specifying the number of these carriers that are either dominant in their field of operations or are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of incumbent local exchange carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that 1,037 or fewer providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

58. *Competitive Local Exchange Carriers.* Neither the Commission nor the SBA has developed a specific definition for small providers of competitive local exchange services. The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>87</sup> According to the Commission's *Telephone Trends Report* data, 349 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.<sup>88</sup> Of these 349 companies, 297 reported that they have 1,500 or fewer employees and 52 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>89</sup> The Commission does not have data specifying the number of these carriers that are either dominant in their field of operations or are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of competitive local exchange carriers that would qualify as small business concerns under the SBA's definition.

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<sup>83</sup> *Id.* § 632.

<sup>84</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>85</sup> Telephone Trends Report, Table 5.3.

<sup>86</sup> *Id.*

<sup>87</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>88</sup> Telephone Trends Report, Table 5.3.

<sup>89</sup> *Id.*

Consequently, the Commission estimates that fewer than 297 providers of competitive local exchange service are small entities that may be affected by the rules.

59. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access providers (CAPS). The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>90</sup> According to the Commission's most recent *Telephone Trends Report* data, 349 CAPs or competitive local exchange carriers and 60 other local exchange carriers reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.<sup>91</sup> Of these 349 competitive access providers and competitive local exchange carriers, 297 reported that they have 1,500 or fewer employees and 52 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>92</sup> Of the 60 other local exchange carriers, 56 reported that they have 1,500 or fewer employees and 4 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>93</sup> The Commission does not have data specifying the number of these carriers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of CAPS or other local exchange carriers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are 297 or fewer small entity CAPS and 56 or fewer other local exchange carriers that may be affected by the rules.

60. *Local Resellers.* SBA has developed a definition for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>94</sup> According to the Commission's most recent *Telephone Trends Report* data, 87 companies reported that they were engaged in the provision of local resale services.<sup>95</sup> Of these 87 companies, 86 reported that they have 1,500 or fewer employees and one reported that, alone or in combination with affiliates, it had more than 1,500 employees.<sup>96</sup> The Commission does not have data specifying the number of these local resellers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of local resellers that would qualify as small business concerns

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<sup>90</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>91</sup> Telephone Trends Report, Table 5.3.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>95</sup> Telephone Trends Report, Table 5.3.

<sup>96</sup> *Id.*

under the SBA's definition. Consequently, the Commission estimates that there are 86 or fewer local resellers that may be affected by the rules.

61. *Toll Resellers.* The SBA has developed a definition for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>97</sup> According to the Commission's most recent *Telephone Trends Report* data, 454 companies reported that they were engaged in the provision of toll resale services.<sup>98</sup> Of these 454 companies, 423 reported that they have 1,500 or fewer employees and 31 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>99</sup> The Commission does not have data specifying the number of these toll resellers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of toll resellers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are 423 or fewer toll resellers that may be affected by the rules.

62. *Payphone Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to payphone service providers (PSPs). The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>100</sup> According to the Commission's most recent *Trends in Telephone Service* data, 758 PSPs reported that they were engaged in the provision of payphone services.<sup>101</sup> Of these 758 payphone service providers, 755 reported that they have 1,500 or fewer employees and 3 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>102</sup> The Commission does not have data specifying the number of these payphone service providers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of PSPs that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are 755 or fewer PSPs that may be affected by the rules.

63. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers.

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<sup>97</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>98</sup> Telephone Trends Report, Table 5.3.

<sup>99</sup> *Id.*

<sup>100</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>101</sup> Telephone Trends Report, Table 5.3.

<sup>102</sup> *Id.*

Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>103</sup> According to the most recent *Telephone Trends Report* data, 204 carriers reported that their primary telecommunications service activity was the provision of interexchange services.<sup>104</sup> Of these 204 carriers, 163 reported that they have 1,500 or fewer employees and 41 reported that, alone or in combination with affiliates, they have more than 1,500 employees.<sup>105</sup> We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of IXC's that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 163 or fewer small entity IXC's that may be affected by the rules.

64. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to operator service providers. The closest applicable definition under the SBA rules is for Wired Telecommunications Carriers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>106</sup> According to the Commission's most recent *Telephone Trends Report* data, 21 companies reported that they were engaged in the provision of operator services.<sup>107</sup> Of these 21 companies, 20 reported that they have 1,500 or fewer employees and one reported that, alone or in combination with affiliates, it had more than 1,500 employees.<sup>108</sup> The Commission does not have data specifying the number of these operator service providers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are 20 or fewer local resellers that may be affected by the rules.

65. *Prepaid Calling Card Providers.* The SBA has developed a definition for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>109</sup> According to the Commission's most recent *Telephone Trends Report* data, 21 companies reported that they were engaged in the provision of prepaid calling cards.<sup>110</sup> Of these 21 companies, 20 reported that they have 1,500 or fewer employees and one reported that, alone or in combination with affiliates, it had more than

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<sup>103</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>104</sup> Telephone Trends Report, Table 5.3.

<sup>105</sup> *Id.*

<sup>106</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>107</sup> Telephone Trends Report, Table 5.3.

<sup>108</sup> *Id.*

<sup>109</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>110</sup> Telephone Trends Report, Table 5.3.



1,500 employees.<sup>111</sup> The Commission does not have data specifying the number of these local resellers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of prepaid calling card providers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are 20 or fewer local resellers that may be affected by the rules.

#### **4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements**

66. The rules adopted in the *Second Order on Reconsideration*, which are subject to review here, require IXC's to produce and provide reports to PSPs detailing which payphone-originated calls were completed over a IXC's or a switch-based reseller's network so that the PSPs may verify whether they are being fairly compensated pursuant to section 276 of the Act. This *Further Notice* asks whether these rules should be retained or whether other reporting requirements should be adopted.

#### **5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

67. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>112</sup>

68. The current rules requiring an IXC to track and report payphone calls completed on an IXC's or switch-based reseller's network impose a minimal burden on the IXC or switch-based reseller. This is because IXC's and switch-based resellers already keep track of such data for their own billing and collection purposes. In addition, the Commission allows IXC's to diminish their expenses by (1) recovering their reporting costs from other carriers in the call path and (2) outsourcing their reporting obligations to clearinghouses. In this *Further Notice*, the Commission seeks comment on the burdens of these reporting requirements and asks whether alternative requirements should be adopted.

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<sup>111</sup> *Id.*

<sup>112</sup> 5 U.S.C. § 603(c).

**6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

69. None.

**V. ORDERING CLAUSES**

70. Accordingly, IT IS ORDERED that pursuant to the authority contained in sections 1, 4(i), 4(j), and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 276, this *Further Notice of Proposed Rulemaking* IS ADOPTED.

71. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.<sup>113</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>113</sup> See 5 U.S.C. § 603(a).

**APPENDIX**Comments filed in Response to Coalition Petition

Airtouch Paging (AirTouch)  
American Public Communications Council (APCC)  
AT&T Corp. (AT&T)  
Cable & Wireless USA, Inc. (Cable and Wireless)  
Frontier Corporation (Frontier)  
International Telecard Association (ITA)  
MCI WorldCom, Inc. (MCI WorldCom)  
Qwest Communications Corporations (Qwest)  
Sprint Corporation (Sprint)  
Telecommunications Resellers Association (TRA)

Reply Comments filed in Response to Coalition Petition

APCC  
Coalition  
ITA  
Qwest  
TRA  
Williams Communications, Inc. (Williams)